United Nations A/C.6/62/SR.12

General Assembly
Sixty-second session

Official Records

Distr.: General
12 December 2007

Original: English

Sixth Committee

Summary record of the 12th meeting
Held at Headquarters, New York, on Wednesday, 24 October 2007, at 10 a.m.

Chairman: Mr. Tulbure ..... (Moldova)

Contents

Agenda item 81: Report of the United Nations Commission on International Trade Law on the work of its fortieth session (*continued*)

Agenda item 84: Consideration of prevention of transboundary harm from hazardous activities and allocation of loss in the case of such harm

Agenda item 78: Responsibility of States for internationally wrongful acts

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07-55804 (E)

The meeting was called to order at 10.05 a.m.

Agenda item 81: Report of the United Nations Commission on International Trade Law on the work of its fortieth session (*continued*) (A/62/17 (Part I))

1. **Ms. Celis** (Bolivarian Republic of Venezuela) expressed appreciation of the legislative guides and model laws produced by the United Nations Commission on International Trade Law (UNCITRAL) in the discharge of its function of unification and harmonization. Her delegation attached special importance to the work of Working Group II (Arbitration and Conciliation), especially since alternative solutions to commercial and investment-related disputes needed to be sought within the framework of a common methodology that would guarantee just and equitable decisions and be equally satisfactory to all States.

2. She looked forward to the completion of the Commission's work on a draft convention on transport law, which, through the incorporation of its norms into the domestic legislation of Member States, would contribute to the unification of maritime trade law. She noted, lastly, that her country had begun the process of internal consultations with a view to submitting in good time its comments on the draft text on indicators of commercial fraud.

3. **Mr. Baghaei Hamaneh** (Islamic Republic of Iran), having acknowledged the Commission's contributions to the progressive harmonization and unification of international trade law, called on the Commission to intensify its efforts concerning the provision of technical assistance and the dissemination of expertise. Particular attention in that regard should be paid to the developing and least developed countries, with a view to helping them upgrade their national legal capacities so as to allow them to foster trade by making use of advances in communication technologies.

4. His delegation commended Working Group II (Arbitration and Conciliation) for the progress made regarding the revision of the UNCITRAL Arbitration Rules. In that connection, care must be taken not to alter the structure, spirit or style of the text and to retain its flexibility. That work was important, since the Arbitration Rules had been used as a model by many countries in the enactment or modernization of their own legislation.

5. The working methods of UNCITRAL should be reviewed in the light of new developments in international trade. It was also imperative to find ways to ensure more effective participation of developing countries and of representatives of all legal systems in the Commission's activities. A number of General Assembly resolutions, including resolution 61/32, had indicated the importance of that matter for Member States.

6. The Islamic Republic of Iran had signed the United Nations Convention on the Use of Electronic Communications in International Contracts at the 2007 treaty event. The Convention, which would have force of law after ratification by Parliament, would help his country to adopt the domestic legislation needed in the field of electronic commerce to facilitate and promote the use of electronic communications in domestic and international trade. The Government had already prepared a comprehensive programme with that aim in mind. The enactment of specific legislation based on the UNCITRAL Model Laws on Electronic Commerce and Electronic Signatures had been one of the main achievements in that regard.

7. **Ms. Valanzuela Diaz** (El Salvador) said that El Salvador had begun participating as a member in the work of the Commission at its fortieth session earlier in 2007. It had held a seminar on international trade law sponsored by the United Nations with the support of the UNCITRAL secretariat and was engaged in the preparation of legislative bills based on UNCITRAL model laws in areas covered by four of the Commission's Working Groups, namely security interests, electronic commerce, arbitration and insolvency. In addition, it had recently ratified the Convention on Contracts for the International Sale of Goods and would soon be signing the Convention on the Use of Electronic Communications in International Contracts.

8. **Ms. Sabo** (Vice-Chairperson of the United Nations Commission on International Trade Law (UNCITRAL)) thanked delegations for their interest in and support for the current and future work of UNCITRAL. In particular, she welcomed the emphasis placed by many delegations on the importance of the Commission's work in relation to the rule of law. Noting the concerns expressed about certain projects and about the Commission's working methods, which would be conveyed to the Commission, she said that the Commission and its working groups were aware of

the issues in question and would be addressing them. However, she was certain that the statements made by Committee members would encourage UNCITRAL, with the support of its secretariat, to continue to fulfil its role as the core legal body in the United Nations system in the field of international trade law.

9. She encouraged all States to participate in the work of the Commission, since participation was not limited to members. She also encouraged them to consider becoming parties to the UNCITRAL conventions and adopting legislation based on the UNCITRAL model laws, both of which contributed to the harmonization of international trade law. Lastly, she welcomed the appreciation expressed for the work of the UNCITRAL secretariat.

Agenda item 84: Consideration of prevention of transboundary harm from hazardous activities and allocation of loss in the case of such harm (A/56/10 and A/61/10)

10. **The Chairman** recalled that the item under consideration had been included in the agenda of the sixty-second session pursuant to General Assembly resolution 61/36. In 2001, the International Law Commission had completed the articles on prevention of transboundary harm from hazardous activities (A/56/10, para. 97) and had recommended to the Assembly the elaboration of a convention on the basis of the articles. In its resolution 56/82, the Assembly had taken note of the articles and had requested the Commission to resume its consideration of the liability aspects of the topic.

11. In 2006, the Commission had completed its work on the liability aspects and had adopted principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities (A/61/10, para. 66). It had recommended to the Assembly that it should endorse the principles by way of a resolution and urge States to take national and international action to implement them. In its resolution 61/36, the Assembly had taken note of the principles and commended them to the attention of Governments. It was necessary for the Assembly to decide at its current session how to proceed on the two aspects of the item, bearing in mind the recommendations of the International Law Commission.

12. **Mr. Sheeran** (New Zealand), speaking on behalf of the CANZ group of countries (Australia, Canada and New Zealand), said that the articles on prevention of transboundary harm from hazardous activities provided a valuable framework of obligations that should be recognized by States in whose territory or jurisdiction hazardous activities were undertaken. The question of what action should be taken with regard to the articles was a central issue at the current session.

13. The CANZ countries particularly welcomed the clear statement in the articles of the obligation of the State of origin to take all appropriate measures to prevent significant transboundary harm; the fact that the articles applied to activities not prohibited by international law which involved a risk of causing significant transboundary harm and to both land and maritime boundaries; the determination of factors for achieving an equitable balance of interests; the establishment of notification and consultation procedures; and the elaboration of a dispute settlement mechanism. Nonetheless, there was scope for further evolution of thinking on the subject. For example, it was important not to restrict risk situations artificially to those where there was a high probability of significant transboundary harm or a low probability of disastrous transboundary harm. There could be medium-risk situations in which preventive action would be justified. It was important to consider what action should be taken in such situations.

14. The Committee's decision in 2001 not to take action on the articles had reflected the need to weigh carefully the close relationship between the prevention and liability aspects of the topic. Now that the work on liability was complete, a decision on further action could be taken. The CANZ countries believed that, without broad and unified support, it would not be helpful to try to progress to a convention based on the articles. Rather, the General Assembly should welcome the articles and commend them to the attention of Member States without prejudice to their future use in a convention.

15. The General Assembly should also encourage States to be guided by the articles and the principles on the allocation of loss in the conduct of their relations, in particular when negotiating relevant agreements at the bilateral and multilateral levels. The CANZ countries would not object if Member States wished to place the articles on the agenda of a future session, preferably a session at which other Commission topics might come up for review. Such an approach would facilitate progress on an important topic and would

help to encourage a more consistent, coherent and fair international legal regime for transboundary harm arising out of hazardous activities.

16. **Ms. Holten** (Norway), speaking on behalf of the Nordic countries (Denmark, Finland, Iceland, Norway and Sweden), said that the articles on prevention of transboundary harm arising out of hazardous activities and the principles on allocation of loss from such harm were important contributions to the development of international law on prevention and civil liability. They did not, however, replace or reduce the responsibility of the State under international law. They provided a minimum standard for the development of further rules on prevention and liability and were also a source of valuable guidance in areas outside their specific subject matter of hazardous activities. In any case, where transboundary harm had been identified, that was a sign that the activities causing it had themselves been hazardous. As detailed rules and regulations were required at both the national and international levels for the effective implementation of the articles and principles, further cooperation should be encouraged among States to that end.

17. **Ms. Galvão Teles** (Portugal) said that the articles and the principles constituted a positive step towards the establishment of measures for prompt and adequate compensation to victims of transboundary harm and measures to minimize the harm and loss which could result from incidents involving hazardous activities. The question of the final form of the articles and the principles should be analysed in the light of the history of the topic and the purposes of codification and progressive development of international law, which should be harmonious and coherent.

18. Though it was largely accepted in the doctrine that international responsibility and the obligation to make reparation for wrongful acts were solid customary norms, that was probably not the case with liability for lawful acts, which was of a more exceptional nature and was dependent on conventional rules. It might, therefore, be unwise to advance too far on the topic of liability before any definitive action was taken with regard to responsibility of States for internationally wrongful acts. On the other hand, prevention of transboundary harm and international liability for loss arising from such harm should be treated as having equal legal nature and enforceability. Since the articles aimed to create a legal obligation for States to prevent transboundary harm, it was logical and equally relevant to impose on them the legal obligation to take the necessary measures to provide prompt and adequate compensation and to minimize the harm and loss which might result from incidents involving hazardous activities. When a State violated its obligation to take those measures, it should also incur international responsibility.

19. If the current will of the international community was to keep the principles on the allocation of loss in their current form — a set of principles endorsed by a General Assembly resolution — then the content of the articles and the principles would have to reflect their general, "soft-law" character more closely. In that case, the principles should be drafted as a true declaration of principles and not as a convention in disguise, and the articles on prevention would also have to be revisited in order to ensure coherence.

20. Her delegation hoped that it would one day be possible to have a single convention on international liability for injurious consequences arising out of acts not prohibited by international law, where the responsibility of States in that regard was adequately assumed and a real system of compensation was in place.

21. **Mr. Ma** Xinmin (China) said that the articles on prevention of transboundary harm from hazardous activities and the principles on the allocation of loss in the case of transboundary harm arising out of such activities were good examples of the progressive development of the relevant rules of international law. They supplemented the current system of State responsibility and represented lex ferenda. The provisions contained in those two texts would help to reduce or prevent the occurrence of transboundary harm arising out of hazardous activities and would serve as a useful reference for States when they had to deal with such questions.

22. The articles and principles defined "State of origin" as the State in whose territory, or under whose jurisdiction or control, the hazardous activities were planned or carried out, but using territory or places under the de facto jurisdiction or control of a State as the sole criterion to define the State of origin was not entirely fair or reasonable. Further elements which should be borne in mind when defining the State of origin were the State of nationality of the operator, the host State of the major part of the operator's business

and the host State of the entity which ordered or controlled the relevant operations.

23. Provisions concerning exceptions to, or exemptions from, the obligation of prevention and the ensuing State responsibilities should be added to the articles on the prevention of transboundary harm in order to cover cases of force majeure, such as natural disasters or armed conflicts.

24. As to their ultimate form, both the articles and the principles could initially be included in a General Assembly resolution or a General Assembly declaration, or an annex thereto, with a view to their being fleshed out by State practice. When the right conditions obtained, consideration could then be given to the formulation of an international convention based on the articles or the principles.

25. As the largest developing country with a vast territory, China faced great risks of transboundary harm from hazardous activities. His Government had therefore consistently held that addressing such harm required international and regional cooperation and a joint response. It had already striven to find an appropriate response to the prevention of transboundary harm from hazardous activities and to the allocation of loss. Since it was steadfastly following the path of sustainable development and pursuing a policy of reducing the consumption of resources and preventing environmental pollution, it was always prepared to join the efforts of the international community to strengthen international law on the prevention of transboundary harm from hazardous activities and compensation for such harm.

26. **Mr. Malpede** (Argentina) said that his Government was in favour of drafting a convention which established not only an obligation of prevention, but also rules on the obligation of States to take the necessary measures to secure the compensation of victims of transboundary harm arising out of hazardous activities not prohibited by international law, in keeping with the tenets underlying the articles on prevention of transboundary harm from hazardous activities.

27. The draft principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities constituted a positive contribution to the progressive development of international law, which must guide States when they drew up national laws and regulations and concluded bilateral and multilateral treaties on the subject. The final form of the principles must fit in with that of the articles on prevention of transboundary harm from hazardous activities.

28. **Mr. Donovan** (United States of America) said that the principles on allocation of loss were a positive step towards encouraging States to establish mechanisms to provide and prompt compensation for victims of transboundary harm. They incorporated progressive ideas such as the responsibility of operator, the desirability of backup financial security measures, the importance of prompt response measures and broad consents of compensable harm and stressed the importance of national, bilateral, regional and sectoral arrangements to put them into effect. Similarly, the articles on prevention were a positive step towards encouraging States to establish mechanisms to address such issues as notification in specific national and international contexts.

29. However, his delegation considered that both texts went beyond the current state of international law and practice. Both were designed to encourage national and international action in specific contexts rather than form the basis of a global treaty. The United States accordingly opposed any efforts to make the principles mandatory or to convert them into a draft convention and likewise opposed the elaboration of a global convention on prevention of transboundary harm. The General Assembly should simply take note of them and encourage their use by States in specific situations.

30. **Mr. Brown** (United Kingdom) expressed general satisfaction with the overall direction of the work of the Commission and the Special Rapporteurs on the topic of transboundary harm. The United Kingdom welcomed the articles on prevention but saw little need for a convention on the subject, which was already covered by a number of binding sectoral and regional instruments. His delegation was prepared, however, to consider the matter with an open mind, should other States be convinced of the added value of such a convention. The United Kingdom agreed with the Commission that the outcome of its work on the liability aspects of the topic should be adopted as non-binding principles.

31. **Mr. Alday González** (Mexico) cited seven basic principles that bore on the question of transboundary harm, namely: State sovereignty over natural resources, but also State responsibility not to cause transboundary

environmental damage; the preventive principle; the cooperation principle; the sustainable development principle; the precautionary principle; the polluter-pays principle; and the principle of shared but differentiated responsibility. Some of those principles were already well-established elements of customary international law, while the others reflected emerging norms of international law. They could all be applied by all members of the international community. However, they had not all been incorporated into the principles on the allocation of loss, in particular the principle of sustainable development, which was indirectly linked to the topic of transboundary harm insofar as its underlying purpose was to ensure the enjoyment of natural resources for future generations. It would therefore be advisable to include it under principle 3, "Purposes".

32. His delegation agreed with the substantive aspects of the principles, particularly in regard to their scope, but considered that principle 2 on the use of terms was in need of clarification. It was vital to include in the definition of damage a definition of what was understood by significant damage to the environment so as to establish the limits within which the principles would be applicable.

33. The stipulation under principle 8 that the principles should be incorporated into each country's domestic law was of great importance and was directly linked to principle 6, which gave victims access to both international and domestic remedies. It should be noted, however, that principle 6 did not specify that victims of transboundary damage were under an obligation to exhaust domestic remedies before seeking international redress. That point might merit further consideration.

34. In addressing the issue of allocation of loss, the principles did not provide for cases where there was more than one State of origin and, for that reason, all the related provisions should be thoroughly reviewed. Moreover, the term "allocation of loss" was inadequate since one of the main functions of the liability regime was compensation for damage and not simply apportionment of loss and appeared to create a legal regime for such compensation distinct from the set of norms deriving from the polluter-pays principle. His Government would prefer that strict liability should be assigned to the operator, which would be in keeping with, international instruments in the area of civil liability and with the nature of hazardous activities.

35. The outcome of the work on liability should take the same form as that on prevention, so as to give them a normative as well as an exhortatory character, in view of the close link between the two regimes. Since the main purpose of the principles, according to principle 3, was to ensure prompt and adequate compensation to victims of transboundary damage, it was important that they take as their starting point the principle *sic utere tuo ut alienum non laedas*, recognized in particular by the International Court of Justice as a norm of customary international law, according to which no State could use its territory or allow its territory to be used in such a way as to cause damage to the territory, property or persons of a neighbouring State.

36. **Mr. Yokota** (Japan) endorsed the *sic utere tuo* principle and said that the obligation of prevention per se had become a part of customary international law. The articles on that part of the topic, in particular articles 6 and 12, offered a good model for the effective implementation of States' related obligations to seek prior authorization for hazardous activities and to exchange information concerning such activities; however, they could not be said to be a codification of well-established customary international law. It would therefore be premature to start converting them into a convention. It would be preferable to allow time for State practice to accommodate before any further action was taken. As for the principles on the allocation of loss, they appeared to have adopted the civil responsibility approach, including the polluter-pays principle, rather than an approach assigning entire responsibility to the State. The language used was the result of compromises, reached in order to adopt the text in the form of principles, not as a convention. If there was a move towards the elaboration of a convention, it would reopen the debate and have a negative impact on the text already adopted. His Government was therefore of the opinion that the principles should remain as they were for the time being. Lastly, if the articles on prevention were converted into a convention, the responsibility that could be attributed to the State for failure to comply with the obligations laid down therein might not be covered by the principles. Further thought might for that reason be given to the relationship between the two texts.

37. **Ms. Govindasamy** (Malaysia) said that clarification was required as to the level of

accountability for transboundary harm. According to the principles, the "operator" was responsible for such harm; it needed to be made clear whether the "operator" was exclusively the persons or entities involved in the commercial aspects of the hazardous activity or whether the State should be made responsible for the commercial activities of its citizens. It was also necessary to specify the threshold for "significant damage" in order for compensation to be awarded and to agree on a clear method for quantifying damage caused to the environment.

38. She raised the question, lastly, of the immediate measures to be taken by the State of origin to ensure prompt and adequate compensation. In the case of Malaysia, a person convicted of an offence under the 1974 Environmental Quality Act could be ordered to pay compensation to the victim as well as related costs; the Act had also put in place measures for prevention, conservation, restoration and recovery.

39. **Mr. Marri** (Pakistan) said that appropriate measures should be in place to ensure prompt and adequate compensation to natural and legal persons, including States, that incurred harm or loss because of hazardous activities. Indeed, a number of international, regional and national agreements had been concluded in that area. His delegation therefore acknowledged the importance of a convention on the issue. There was, however, a difference of opinion as to whether the convention should cover clearly circumscribed activities and not situations, such as air pollution, which was insidious and might have cumulative effects. It had been suggested that the activity must take place in the territory or under the jurisdiction or control of the State of origin, that it must carry a risk of causing significant transboundary harm and that there had to be a clear direct physical effect and causal connection between the activity and the harm suffered. More time would be required for member States to reach an agreement in that regard.

40. On the question of threshold for compensation, it might be helpful to establish an agreed list of transboundary activities falling within the scope of the proposed convention. Accordingly, a regime had to be negotiated between States that would be applicable to activities carrying a risk of transboundary harm.

41. His delegation considered that an early agreement should be reached on the principles. That could lead to the establishment of national and international mechanisms to address the outcomes of hazardous activities, including compensation aspects. Each State should take measures to ensure compensation for victims of transboundary harm, including through the establishment of industry-wide funds. As stated in principle 4, liability should be imposed on the operator without proof of fault.

42. He emphasized the importance of the response measures provided for in principle 5. There was also a need for an inter-State dispute resolution mechanism for the settlement of claims by individuals and States. Such disputes might concern determination of responsibility within a State, extent of damage within and outside a State and identification of victims or, where the environment had been harmed, the recipient of compensation. His delegation was open to discuss any proposal aimed at consolidating the work of the Commission on the important topic under consideration.

43. **Ms. Zabolotskaya** (Russian Federation), having commended the articles on prevention of transboundary harm from hazardous activities and the principles on the allocation of loss in the case of such harm, said that, with regard to the area covered by the principles, the diversity of opinion among States was largely due to the "sectoral" practice of treaty regulation of liability issues in that area. However, the number of States that were parties to such treaties was small. The international community was only just beginning to address such questions and was not always ready to enter into strict obligations under international law. At the same time, it was clear that a number of general trends in international and national legal regulation in that area had emerged. Her delegation therefore believed that the Commission had chosen the most appropriate form — a set of principles — for the outcome of its work on the subject.

44. Her delegation endorsed the Commission's decision not to include in the scope of application of the principles damage to the environment that occurred beyond the limits of national jurisdiction. It also endorsed the retention of the criterion of "significance" of harm and the decision not to attempt to elaborate an exhaustive list of activities.

45. Her delegation welcomed the formulation of principle 4, since it did not oblige the State to pay compensation to the victims of damage but rather to

take all necessary measures to ensure that compensation was available. That was a rational approach, since the principles dealt exclusively with activities not prohibited by international law. Her delegation likewise supported the imposition of strict liability on the operator. However, it should be noted that international legal instruments governing various aspects of liability usually provided for circumstances in which the operator was not held liable, for example, where the damage had occurred as a result of a natural disaster or military conflict or where the State of the operator had not taken all the necessary action with regard to the operator pursuant to international law. Such circumstances should be mentioned in the commentary.

46. Her delegation had some questions about individual provisions, such as the scope of the concept of damage to the environment per se. Nonetheless, it welcomed the principles overall and considered that they could be adopted by the General Assembly in the form of a declaration.

47. The principal value of the articles on prevention of transboundary harm from hazardous activities lay in the fact that they developed further the concept of prevention in the context of hazardous activities which involved a risk of causing transboundary harm. It was also important to establish a mechanism for the cooperation necessary to implement the principle of equitable balance of interests.

48. The provisions of article 8, paragraph 2, differed somewhat from the corresponding provisions of the 1990 Convention on Environmental Impact Assessment in a Transboundary Context. It was not completely clear whether the State likely to be affected by the activity should provide a final response within six months or whether it could provide an interim response.

49. Article 9, paragraph 3, should specify to what extent the State of origin was obliged to take into account the interests of the State likely to be affected if consultations failed to produce an agreed solution. Such an obligation should be based only on the aim of achieving an equitable balance of interests.

50. With regard to article 11, paragraph 3, the obligation on the State of origin to suspend for a reasonable period an activity which involved a risk of harm, if so requested by the State likely to be affected, could place an excessive burden on the State of origin for a number of reasons. First, article 9 did not establish any requirement to suspend the activity in question for the duration of consultations or for any other period. Second, the 1997 Convention on the Law of the Non-navigational Uses of International Watercourses, which was mentioned in paragraph 6 of the commentary to article 11, provided that, in a similar situation, the State of origin could be requested to refrain from implementing the measures in question. Moreover, that provision covered planned measures rather than measures already being implemented. Article 9, paragraph 3, could place a similar obligation on the State of origin to refrain only from a planned activity for a period of up to six months.

51. The articles and the principles each had independent importance, although they logically complemented each other. They could therefore be endorsed either separately or together. It might be most appropriate for them to be adopted by the General Assembly in the form of a declaration.

52. **Ms. Celis** (Bolivarian Republic of Venezuela) commended the work of the International Law Commission on the progressive development of international law and its codification, which advanced the cause of sovereignty and freedom of States to conduct and permit activities in their territory or under their jurisdiction or control. In particular, she commended the principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities, which represented significant progress in the implementation of Principles 13 and 16 of the Rio Declaration on the Environment and Development.

53. **Mr. Bühler** (Austria) said that, in the light of statements by other delegations, his delegation believed that the time was not yet ripe to reach a consensus decision on the ultimate form of either the articles on prevention of transboundary harm from hazardous activities or the principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities. The Committee should therefore defer a decision on the matter for three to five years. Meanwhile, the Secretariat should be requested to prepare a report on the views and practice of Member States in that regard.

54. **Mr. Pratomo** (Indonesia) said that the complexity of the topic of international liability was well demonstrated by the fact that the Commission had

decided to tackle the issue of the liability regime separately from that of the prevention regime. Although the topic was clearly still at the progressive stage of codification, however, it was of crucial importance, because the principles drew attention to the vulnerable nature of environments damaged even by lawful activities and, as a corollary, of the legal remedies for the victims. His delegation commended the Commission's approach of elaborating principles of a general and residual nature, thus allowing States the flexibility of designing specific liability regimes to suit particular activities. The principles therefore served as a set of general guidelines for the bilateral relations of States with regard to preventing transboundary harm caused by hazardous activities within their jurisdictions. Practical implementation measures deriving from the principles would thus be for the States concerned to adopt by mutual agreement, and specific compensation arrangements concluded between them would take precedence over the principles, in accordance with the residual nature of the latter.

55. Since there were still divergent views on some core issues in the principles, particularly in relation to mechanisms for the provision of prompt and adequate compensation, his delegation considered that the principles deserved further reflection. One issue that should be addressed was the inconsistency between the use of the word "operator" in principle 2 (g), where it referred to a natural person, and principle 4, paragraph 2, which equated the operator with an entity, which was an artificial person. The issue was pertinent in situations where the entity concerned was a multinational corporation, since such a corporation might also have legal standing in a State different from the State in which the transboundary harm occurred. It was common for multinational corporations to relocate their hazardous industries in developing countries for a number of reasons.

56. Although a developing State might profit from the activities of a multinational corporation, it would be unfair to allocate to it residual liability for transboundary damage as the State of origin, particularly since national industry funds were not always available in developing States. The imposition of residual liability on the State, which would be valid in theory, would only create problems in practice. The operator should bear the primary responsibility in any regime of allocation of loss, because the operator, not the State, profited from the operation. In that connection, his delegation believed that principle 7, paragraph 2, which dealt with the establishment of industry funds at the international level to supplement or replace State funds, should be reformulated in order to reflect common and differentiated responsibility, taking into account the operations of multinational corporations.

57. The language of principle 6 should be revisited in order to reflect the fact that the principles constituted a set of general guidelines. In particular, principle 6, paragraph 3, which provided for alternative mechanisms for claimants seeking redress in cases of a possible multiplicity of claims, thus avoiding forum shopping, should be clarified. Although the proposition had some merit, State practice was not uniform in that regard. Other elements that should be incorporated into the text were exemption clauses due to force majeure and the cases in which the transboundary harm emanating even from carefully conducted activities was unforeseeable and untraceable.

58. More time was needed for reflection on the principles before a decision was taken on the form that they should take. Moreover, the topic should be considered in conjunction with the issues of prevention and State responsibility. A working group might be established by the Committee to clarify some of the difficulties highlighted by many delegations. Only after such a step could well-founded decisions be taken.

Agenda item 78: Responsibility of States for internationally wrongful acts (A/62/62 and Corr.1 and Add.1 and 63 and Add.1)

59. **The Chairman** recalled that the draft articles on responsibility of States for internationally wrongful acts had been adopted by the International Law Commission at its fifty-third session in 2001. The Commission had recommended to the General Assembly that it should take note of the draft articles in a resolution, to which they would appear as an annex. It had further recommended that the General Assembly should, in view of the importance of the topic, consider, at a later stage, the possibility of convening an international plenipotentiary conference to examine the draft articles with a view to concluding a convention on the topic. General Assembly resolution 56/83 had taken note of the articles, the text of which had been annexed to the resolution, and commended them to the attention of Governments, without

prejudice to their future adoption or other action. In 2004, General Assembly resolution 59/35 had once again commended the articles to the attention of Governments, which had been invited to submit their comments on any future action. The resolution had also requested the Secretary-General to prepare an initial compilation of decisions of international courts, tribunals and other bodies referring to the articles and to invite Governments to submit information on their practice in that regard. Comments and information received from Governments were contained in document A/62/63 and Add.1 and the compilation of decisions of international courts, tribunals and other bodies in document A/62/62 and Corr.1 and Add.1.

60. **Mr. Rose** (Australia), speaking on behalf of the CANZ group of countries (Australia, Canada and New Zealand), said that the General Assembly was again faced with the question of whether to negotiate the articles on the responsibility of States for internationally wrongful acts, as a convention, adopt them in the form of a resolution or declaration, or simply to take note of them, with no further action. For the CANZ group, it was a question not to be dismissed lightly. It was clear from the Secretary-General's report (A/62/62/Corr.1 and Add.1) that a growing body of practice existed on utilizing the articles. The International Court of Justice had referred to them on a number of occasions, including, most recently, in its decision on the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (*Bosnia and Herzegovina v. Serbia and Montenegro*) in February 2007. Altogether, there had been some 130 judicial or quasi-judicial references to the articles and the commentaries.

61. It would not be helpful to negotiate the articles as a convention, since such action might upset the delicate balance of the text. There was a danger that the current force and practical authority of the articles would be weakened through a convention that did not achieve wide adherence. The best course of action would be to adopt a resolution endorsing the articles and attaching them as an annex. In that way, their integrity would be maintained.

62. **Ms. Sotaniemi** (Finland), speaking on behalf of the Nordic countries (Denmark, Finland, Iceland, Norway and Sweden), said that the articles on responsibility of States for internationally wrongful acts constituted one of the International Law Commission's most significant projects. The fact that, according to the Secretary-General's report, there had already been 129 instances in which international courts, tribunals and other bodies had referred to the articles as an established rule of international law or an expression of accepted principles of international law reflected their impact on international dispute settlement. Indeed, the articles had become the most authoritative statement available on questions of State responsibility. Attaching the articles to a resolution had not only been an appropriate form for them to take, in view of their subject matter but had given them the strongest possible authority. Although there might be different views on specific details, the articles reflected a widely shared consensus. A diplomatic conference aimed at producing a convention might jeopardize the delicate balance that currently existed. It would therefore be inadvisable to embark on negotiations leading to a convention.

63. **Mr. Gouider** (Libyan Arab Jamahiriya) said that practice of some States and references to the articles by such bodies as the International Court of Justice in its advisory opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* constituted additional reasons to adopt a convention. Both General Assembly resolution 56/83 and the Special Rapporteur had suggested the possibility of convening an international conference of plenipotentiaries to examine the draft articles. To refrain from doing so because of political sensitivities would be to ignore the need to develop international law. Such sensitivities had not prevented the negotiation and entry into force of numerous other international agreements that touched on political issues and had become major sources of international law.

64. **Mr. Sen** (India), said that the articles on responsibility of States for internationally wrongful acts had a number of merits: they were concise and the concepts involved had been modified for ease of implementation. They also exhibited sensitivity to the needs of States in difficult circumstances.

65. The Commission had replaced the concept of State crimes by the concept of a serious breach of an obligation arising under a peremptory norm of general international law. The complexity of the concept of countermeasures, the synergy between countermeasures and the provisions on attribution of State conduct, the timing of a breach of international law, circumstances precluding wrongfulness, the remedies available for

injuries and the legal standing to invoke responsibility all merited a mention, since some of the articles concerned incorporated what had been termed "constructive ambiguity".

66. He recalled that the 12 State crimes listed in the original draft had been whittled down to six. After a heated debate on the topic, the Commission had made what might seem the anticlimactic decision to replace State crimes by breaches of *jus cogens* and *erga omnes* rules, which were customary imperatives of international law. The result was that the serious breach of obligations arising from a peremptory norm of international law was not very different from other wrongful acts, except there was an obligation to bring the breach to an end, and other States, apart from the injured State, were entitled to invoke State responsibility, subject to certain limitations.

67. There were justified fears that international law should not run ahead of reality, since the international legal system was still decentralized. It would therefore, be prudent to maintain the careful balances in the text that the Commission had struggled for years to achieve. A topic that had taken many years to come to fruition would best serve the needs of the international community only if applied with great care. For the time being, it was enough to witness the reception of the articles into international law through State practice, the decisions of courts and tribunals and the writings of jurists.

68. **Mr. Tavares** (Portugal) said that, in the six years that had passed since the General Assembly had taken note of the articles on responsibility of States for internationally wrongful acts, the international community had been given two opportunities for further reflection. In all, it was almost 60 years since the International Law Commission had embarked on what had certainly been one of its most important projects. His delegation therefore felt that the time was ripe to make a decision on future action.

69. Although Portugal recognized that, as shown by the comments contained in the Secretary-General's report (A/62/63 and Add.1), States held different views on the form that the articles should take, with some supporting the adoption of a convention, others favouring postponing consideration of the issue and yet others favouring the adoption of the articles as part of a General Assembly resolution. The number of States that had submitted comments was, however, very limited and his delegation therefore called on all Member States to express their views in written or oral form before the Committee.

70. Portugal continued to believe that State responsibility was an area of international law that deserved to be incorporated into a legal instrument that would contribute decisively to respect for international law and peace and stability in international relations. Indeed, the articles could and should constitute the third pillar — after the Charter of the United Nations and the Vienna Convention on the Law of Treaties — of the international legal order set up after the Second World War. States should not be overcautious about taking such a step, since the articles were concerned only to establish the consequences of internationally wrongful acts, not to provide for a definition of a wrongful act in itself. State responsibility was concerned only with the secondary and not the primary roles defining the obligations of States. If agreement could be reached, the articles could take the form of a contractual instrument. Convincing evidence for the opportunity — and the fundamental need — to proceed along those lines could be found both in State practice and in the decisions of international courts and tribunals, including the International Court of Justice. It would, furthermore, be senseless to discontinue the development and codification of the topic, yet to proceed with others like diplomatic protection or liability and responsibility of international organizations, when the principles guiding the development of those topics were the same as those applying to State responsibility. The Committee should therefore start the process of adopting the articles as a binding international convention. In order to give time for further reflection, however, it might be appropriate to begin by setting up an ad hoc committee with a mandate to discuss the issue, including the possibility of elaborating an international convention.

71. **Ms. Pino Rivero** (Cuba) said that the articles on responsibility of States for internationally wrongful acts, which had been widely accepted by States after their long gestation, constituted a fine example of the codification and progressive development of international law. The responsibility of a State for wrongful acts, whether actions or omissions committed, in breach of its international obligations, must be regulated by a binding instrument, in order to rein in unilateral action by States contrary to the Charter of the United Nations and the principles of

international law. It would also help to protect States that were victims of unlawful acts committed by other States, which could include such serious actions as aggression or genocide.

72. The articles provided a basis for starting negotiations aimed at the adoption of a legally binding international instrument. An international convention would ensure the efficacy of its mechanisms and proper respect for the institutions that would be established.

73. **Ms. Rodríguez-Pineda** (Guatemala) said that since 2001, when the General Assembly had taken note of articles on the responsibility of States for internationally wrongful acts, the content of some of those articles had been incorporated into customary international law and had formed the basis of State practice and the decisions of international courts. That meant that significant progress had been made in the field in question, because all States had become bound by the norms set in the articles, whose exact meaning and scope could be elucidated by consulting the relevant commentaries.

74. Nevertheless the time had come to codify the subject matter in the form of a multilateral universal convention, since conventions constituted one of the most important sources of international law and helped to fuse custom, practice, general legal principles and existing case law. Sources of law explaining what the law was and where it could be found were vital for the regulation of international affairs and were the main factor promoting the stability and adaptation of law. That was why a convention on State responsibility would increase legal certainty. In addition, codification of the articles would induce States to seek much greater unity in their pursuit of the fundamental values embodied in the Charter of the United Nations, such as democracy, multilateralism, human rights and the rule of law. A convention would also constitute a source of legitimacy to guide the conduct of States.

75. The rules in the articles concerning attribution of conduct to a State, exceptions and reparation were of prime importance for the harmonization of international law and its application by international courts, since when the latter had to hear and try cases involving State responsibility, they needed clear and uniform guidelines in order to avoid legal inconsistencies or political interpretations. For all those reasons, a convention on State responsibility for internationally wrongful acts would strengthen the provisions of the Charter of the United Nations. In that connection, it was, however, necessary to remember that the obligations of Member States under the Charter would always take precedence when they conflicted with any obligations assumed by those States under other international agreements.

76. Codification would thwart the temptation to expand certain basic concepts such as "self-defence"; such redefinition could heighten the probability of armed conflicts and serve as a basis for the use of force in circumstances where there was no threat to States. Furthermore a convention would be beneficial in that it could provide a mechanism for third-party settlement of disputes whose binding decisions would guarantee the protection of the rights and obligations flowing from existing provisions.

77. International peace and security must rest on considerations of universal justice if the ideals prompting the establishment of the United Nations were not to be betrayed. In recent years, States had proved unable to reconcile their national interests with the demands of existing international law, especially in the fields of international humanitarian law and human rights.

78. The articles on State responsibility for internationally wrongful acts were ripe for embodiment in a convention. Such action would be in keeping with Article 13 of the Charter, which laid down that the General Assembly should "encourage the progressive development of international law and its codification". The International Law Commission had produced a work of the utmost importance: the challenge facing the Sixth Committee was to arrive at a text reflecting rules on State responsibility which were acceptable to the international community as a whole without undermining or endangering the Commission's achievements. While she hoped that it would not be necessary to wait a further three years before adopting a decision to draft a convention, her delegation was prepared to explore all possible avenues leading to progress on the subject.

79. **Mr. Guerrero** (Mexico) said he was pleased to note that the International Court of Justice had referred on many occasions to various principles contained in the articles on the responsibility of States for internationally wrongful acts and had in some cases referred explicitly to the articles themselves.

Conversely the principles applied by international courts when assessing compensation were faithfully reflected in the articles. The articles' function as a source of momentum for international standard-setting in the field in question had not ended; it was imperative that the international community should codify the rules on State responsibility.

80. The articles represented one of the most important developments of international law in recent decades. They entailed a transition from a restrictive view of international responsibility basically confined to the protection of persons and their assets in foreign States to a legal approach making international rights and obligations enforceable within a centralized system — in other words, a transition from the perception of *jus gentium* as a set of bilateral contractual arrangements to the building of a genuine universal legal order.

81. Only a legally binding instrument would equip the international community with clear rules on how to remedy breaches of international law. To that end, the General Assembly should convene a diplomatic conference to adopt a convention on the responsibility of States for internationally wrongful acts, in which Member States would participate on an equal footing. The relevance of a binding international instrument on that subject was clear on looking at the true scope of the articles formulated by the Commission. Since the bases for international responsibility was a subject cutting across all areas of international law, the proper codification of the draft articles would make it possible to resolve legal conflicts arising in various contexts on account of acts of States. Moreover a binding legal instrument would alone offer the requisite guarantees and certainty that injured States would obtain reparation. A mere declaration would not supply such guarantees or certainty.

82. A General Assembly declaration which did no more than incorporate the articles would freeze the provisions in the version presented by the International Law Commission and would not afford Member States any opportunity to discuss them. That would result in rules which, as they stood, might not be considered by some States to be the applicable law. There would therefore be little or no likelihood that those States would continue the process of endorsing and implementing those rules through compliance with them.

83. Conversely, consideration of the articles by an intergovernmental body would enable States to continue the work of codification and progressive development initiated by the Commission until they produced rules which stood a real chance of being implemented and observed by the international community. Similarly, the adoption of a convention would help to stabilize norms without restricting the formation of customary law. Indeed, the adoption of a convention might strongly influence the creation of customary norms.

84. The text prepared by the Commission certainly constituted a valuable basis for negotiations. It was therefore incumbent upon Member States to complete the codification of rules on that subject by adopting a binding instrument which perfected the provisions put forward by the Commission and made them acceptable to the international community as a whole. Such action would greatly help to strengthen the international legal system.

85. **Mr. Ma** Xinmin (China) said that the articles on responsibility of States for internationally wrongful acts not only made an important contribution to the progressive development of international law but also were of significance for the safeguarding of international relations and the maintenance of stability in the international legal order. The articles had been closely studied by Governments and international judicial bodies, which had begun to turn to them for guidance in their practice and proceedings.

86. Yet while the articles as a whole represented a commendable effort, they nevertheless failed to address a number of issues. For example, while his delegation supported the definition of responsibility contained in article 1, it believed that certain matters should be clarified. Specifically, it should be determined whether wrongful acts, either intentional or caused through negligence, and the existence of injury were necessary conditions for State responsibility; whether the relationship between an internationally wrongful act and the injury had to be one of causality; and whether a threshold of gravity existed for internationally wrongful acts.

87. His delegation continued to believe that articles 48 and 54 should be deleted. In a spirit of flexibility, it was prepared to retain them, if the majority of States wished to do so, but proposed that they should be amended to provide for the establishment of a

collective authorization mechanism that would allow concerned States other than the injured State to invoke State responsibility and take legitimate measures, so long as those non-injured States recognized the authority of the United Nations or another international body that represented the collective interests of the international community. In the case of a breach that threatened international peace and security, for example, care should be taken not to undermine the authority of the Security Council. It was not in the international community's interest to give non-injured States free rein when it came to invoking State responsibility and taking legitimate measures, as that practice could easily be abused.

88. His delegation welcomed the distinction drawn in the articles between serious breaches of an obligation under a peremptory norm of international law and general breaches of an obligation under general international law. However, the articles made no distinction between the consequent responsibility entailed by the two types of breach; for example, serious breaches did not entail greater responsibility. Moreover, the legal obligations set out in article 41 did not arise solely in the context of serious breaches. The articles should therefore include provisions spelling out in detail the meaning of serious breaches and the proportional responsibility to be attributed for different types of breaches.

89. His delegation's position on countermeasures had not changed since the fifty-sixth session. The provisions on countermeasures in Part Three, chapter II, of the articles were intended mainly to ensure that responsible States complied with their international obligations. In turn, all injured States had an obligation to ensure that any countermeasures they adopted were in strict accordance with the legislative purpose of the articles.

90. Adoption of the articles in final form should be a phased process, the first step of which might be the adoption of a General Assembly resolution, perhaps with a declaration attached to it. That text could serve as a reference document for State and international judicial bodies. His delegation was prepared to consider the eventual adoption of an international convention having its basis in a General Assembly resolution or declaration on the subject. Should the Assembly decide to adopt a resolution with an annexed declaration, the text of the articles should be supplemented by a preface and a final provision on conflict resolution.

91. **Mr. Fitschen** (Germany) said that the articles on the responsibility of States for internationally wrongful acts had been applied in State practice and referred to in court decisions in many countries. As the compilation of decisions of international courts, tribunals and other bodies (A/62/62 and Add. 1) and the comments of Governments (A/62/63 and Add.1) showed, there was wide recognition that they expressed customary international law.

92. Any attempt to transform the text contained in General Assembly resolution 56/83 into a convention would, however, entail some risk, because negotiation of the text of a convention at a diplomatic conference would almost certainly lead to the reopening of controversial issues and might endanger the support which had prevailed hitherto.

93. While it was, of course, true that a convention would carry more legal weight than the articles, its more obligatory character might be the very reason why a large number of States might refrain from becoming a party to it, since they might not wish to subscribe to a particular individual rule it contained. A convention signed and ratified by a very small number of States would probably be of less practical relevance than the current General Assembly resolution which, although it was not actually binding, served as guidance in practice. As it stood, the International Law Commission's text was referred to by courts and tribunals and it was therefore contributing quite successfully to an evolving pattern of State practice and to the reinforcement of customary international law. That process might end if a controversial convention were to be ratified by only a few States.

94. **Mr. Bühler** (Austria) said that his Government would be in favour of the adoption of a convention on the responsibility of States for internationally wrongful acts only if there were a prospect of it really being ratified and accepted. In that connection, he drew attention to the fact that while some States were rather reluctant to adopt a convention on that subject, others had pointed to the close linkage between the articles on State responsibility and those on diplomatic protection and were of the view that the fate of both sets of articles should be decided in tandem. The outcome of the International Law Commission's work on the related topic of the responsibility of international

organizations would also have to be considered in that context.

95. Moreover the drafting of a convention on State responsibility would require additional substantial efforts by States, especially with regard to the question of dispute settlement, which might prove highly controversial. If it turned out that a convention was not yet feasible, the question should be reconsidered by the General Assembly in the future when the adoption of the articles as a convention, or in any other appropriate form, might be possible. At all events, care should be taken not to alter the careful balance struck in the Commission's articles and not to make substantive amendments which would jeopardize the results already obtained.

96. **Mr. Zyman** (Poland) said that the articles on the responsibility of States for internationally wrongful acts were in the process of consolidation. Reference had been made to them in the judgments and opinions of the International Court of Justice and the European Court of Human Rights. They were also frequently quoted in the dispute settlement procedure of the World Trade Organization. Furthermore the International Law Commission's work on State responsibility had been widely acclaimed by leading experts and legal writers.

97. It was, however, doubtful whether the adoption of a legally binding instrument in the form of a convention was currently an achievable goal. Moreover the negotiation of a convention could endanger the delicate balance achieved in the articles, reopen old debates and introduce possible contradictions between the two texts, thereby weakening the articles. If the resultant convention were then to be ratified by very few States that would have a "decodifying" effect and reduce the high legal standing and impact attained by the articles. More time was therefore required for further consolidation of the text with a view to adopting a truly universal legal instrument in the future.

98. Even in their non-binding form, the articles on State responsibility, one of the most significant achievements of the International Law Commission, could buttress the rules of international law and shape State practice, legal writings and the decision of international and national judicial and arbitration bodies. They had already gained widespread recognition and approval, and their impact was certain to increase as time passed. That process should not be put at risk. Nevertheless there was merit in keeping the item on the General Assembly's agenda. A resolution at the current session could once again commend the articles on the responsibility of States for internationally wrongful acts to the attention of Governments and express satisfaction that the articles were extensively referred to in legal writings and by international courts and tribunals and other bodies in their decisions and opinions. Such positive wording could be interpreted as a further step towards the gradual transformation of the draft articles from soft law into hard law.

99. **Mr. Arévalo** (Chile) said that, since the regulation of the legal consequences of wrongful acts was central to the international legal system, the articles on the responsibility of States for internationally wrongful acts should be adopted as a convention. The codification and progressive development of international law should generally culminate in the adoption of a convention, as it had done in the past in respect of topics of such cardinal importance as diplomatic and consular relations, the law of treaties and the law of the sea.

100. That did not mean that other formal sources of international law, in particular custom, were of no value; on the contrary, many of the precepts in the articles were part of customary international law and many of the articles were already relied upon in international courts and tribunals. Nevertheless a convention would increase legal certainty as to the content of the obligations of States and would encompass advances in international law. Indeed it was vital that a legally binding instrument should embody the articles' progressive development of international law in areas such as countermeasures and breaches of norms which protected the interests of the international community as a whole and which transcended bilateral relations between the offending and the injured State.

101. Nevertheless, since some elements of the articles deserved more consideration, the time had not yet arrived for the convening of a conference to adopt a convention. Such a conference would in fact require very careful preparation. His delegation was therefore prepared to explore other means of making progress in the meanwhile, for example through the establishment of a working group within the Sixth Committee to examine unresolved issues. It would not be enough to adopt a resolution merely taking note of the adoption of the articles and thanking the International Law

Commission for its work in that respect, because it was necessary to make genuine headway towards the codification and progressive development of such an important subject as State responsibility.

102. **Ms. Govindasamy** (Malaysia) said that some of the articles on the responsibility of States for internationally wrongful acts would benefit from further clarification. That was true of article 7 concerning the *ultra vires* acts of State organs or entities. While the conduct of an organ or person empowered to exercise governmental authority should be deemed valid, it would be unjust to attribute conduct to a State when the conduct of an organ or person had clearly exceeded their authority.

103. Her Government shared the view that no further action should be taken on the articles for the time being, so that their subject matter could evolve through State practice and jurisprudence. It was likewise concerned that any move towards adopting the articles in the form of a convention would reopen negotiations on their text and weaken the current consensus on their scope and contents. As the compilation of decisions of international courts, tribunals and other bodies (A/62/62 and Add. 1) showed, there appeared to be growing acceptance of the articles and it could therefore be concluded that, in their current non-binding form, they provided sufficient guidance to States, international courts and tribunals and legal writers.

The meeting rose at 1 p.m.